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Supreme Court of the United States

OCTOBER TERM, 1903

No. 274.

CITY OF SEATTLE, APPELLANT,

vs.

JOHN W. THOMPSON,

BRIEF ON MOTION TO DISMISS

Daniel Kelleher, as administrator of the deceased appellee, Thompson, appears specially for the purpose of this motion only and moves the court for an order dismissing this appeal for want of jurisdiction. This motion is based upon the record and upon the affidavit of the aforesaid administrator served herewith.

FRED'K BAUSMAN,
Appearing specially as Counsel for Daniel Kelleher as Administrator.

To the above named appellant and to Messrs. Mitchell Gilliam and Scott Calhoun, your counsel:

You and each of you will please take notice that the above named administrator will call up the foregoing for hearing on Monday, October 19, 1903, at the opening of court, or as soon thereafter as counsel can be heard.

FRED'K BAUSMAN,
Specially appearing as Counsel for Daniel Kelleher, Administrator.

Received copy of this motion (with affidavit) and notice, August 11, 1903.

MITCHELL GILLIAM,
Counsel for Appellant.

STATEMENT.

The affidavit annexed to the motion to dismiss and duly filed in this court sufficiently states our grounds. Omitting its caption and verification, Mr. Kelleher's statement is as follows:

"I am, and during thirteen years last past have been, a resident of the City of Seattle, County of King, State of Washington, and continuously engaged in the practice of law in that city."

"This cause was begun in the Circuit Court during the lifetime of John W. Thompson, and before his death the decree now appealed from by the City was entered in his favor. The date of the signing and filing of the decree was June 22, 1901. The death of deceased Thompson occurred July 11th following. By his will the American Security and Trust Company of the District of Columbia was created, and ever since has been the duly qualified and public trustee of his estate. In addition thereto this affiant was, by the Superior Court of King County, State of Washington, on August 6th following, appointed administrator,

and ever since has been legally and publicly administrator, of the estate within this State of Washington.

"The only proceedings by the city known to this affiant are an appeal by it to the Circuit Court of Appeals for the Ninth Circuit, taken October 24th following the decree and the death of deceased Thompson, which appeal upon motion was by that court, on the 24th day of February, 1902, dismissed for want of jurisdiction, on the ground that jurisdiction of this cause on appeal was vested exclusively in the Supreme Court. Thereafter nothing was done by the city until the present appeal in January, 1903.

"At no time has anything been done by the city in either this court or in the Circuit Court of Appeals towards substituting either of deceased Thompson's representatives in this cause or towards reviving or continuing it against either or both of them according to the rules of court and the law. Otherwise than by the motion in the Circuit Court of Appeals to dismiss for want of jurisdiction, neither this affiant nor the other representative of decedent has in any wise participated in or consented to the appellate proceedings at all."

The material dates in the foregoing affidavit appear in the extracts from the record printed for the purpose of this motion. This affidavit, served on August 11th last, has not, up to this 22d of September, been met with any denials, and we may assume that its brief allegations will be conceded to be true.

BRIEF.

Rule 15 of this court provides for two contingencies upon death after decree in the lower court. The first is where death occurs while the appeal is pending, the second when it occurs before the appeal is taken. The present situation is the latter. Thompson's death occurred about a year and a half before this appeal.

Let us turn, then, to the rule. Its section 3 provides for very deliberate process by those who appeal against the dead. If there resides in the district where the judgment was rendered no legal representative, recourse must be had to this court for order and advertisement. Suppose, though, that there does reside a representative in the district where the decree was rendered? Then the suit is to be revived. This the rule plainly indicates. And revived how? According to Equity Rule 56, we should say, since revivor for purpose of appeal only, upon death after decree, was a well understood practice (*Anderson v. White*, 10 Paige 575; *Pier v. Cookerow*, 13 N. J. Eq. 136).

Just whether this second provision of Rule 15 survives section 9 of the Judiciary Act of 1875 (left unrepealed by the act of 1887) is immaterial. That section provides that when the death occurs before appeal, the proceedings to get the representatives in shall be the same as those upon death after appeal. Very good. Let us suppose Thompson's death to have occurred after appeal by the city. What should the city have done? It should have obtained an order from this court in such season as to have had it advertised "for three consecutive weeks at least sixty days before the beginning of the term of the Supreme Court then next ensuing." This has neither been done nor begun, nor can it now be accomplished.

Accordingly, under any aspect of the statute and the rule, this case would seem to come squarely within *Dolan v. Jennings*, 139 U. S. 382, decided in 1891 with all existing provisions in force. See also *Bigler v. Waller*, 12 Wall 147.

The city has shown great negligence here. After the dismissal by the Circuit Court of Appeals in February, 1902 (*City of Seattle v. Thompson*, 114 Fed. 96), had pointed out the true court to appeal to, it waited eleven

months, until January, 1903, to take out this appeal from a decree of June, 1901. It has since waited eight months more without any attempt to comply with a very reasonable rule. Meanwhile, we have the absurdity of an appeal taken after death, together with a citation and a bond addressed to the dead.

Respectfully submitted,

FREDERICK BAUSMAN,
Specially appearing as Counsel for Daniel Kelleher, Administrator.

Received copy of this brief this 11th day of August, 1903.

MITCHELL GILLIAM,
Counsel for Appellant.